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84-1454

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 19__

NO. _____

MISSISSIPPI POWER & LIGHT COMPANY

Appellant

vs.

LOUIS A. CONERLY, ET AL

Appellees

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Miss. Code § 11-27-15, which effectively bars any utility from exercising the power of eminent domain if its proposed transmission line will be used primarily to transmit electricity out of state, is unconstitutional as imposing an impermissable burden on interstate commerce.

Whether a statute allowing a collateral challenge to the findings and order of a Public Service Commission after expiration of the time for a direct appeal and after public utilities have been led reasonably to rely on the finality of such findings and order, violates Fourteenth Amendment rights as a taking of property without due process of law.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 55,641) in the Supreme Court of Mississippi:

Mississippi Power & Light Company,
Plaintiff-Appellant

Louis A. Conerly
Gwendolyn R. Conerly
Lyndell R. Rushing
Frances S. Rushing
Merwin D. Wood
Sarah T. Wood
Ronald Mentel
Judith L. Mentel,
Defendants-Appellees

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 4 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following sections of the Mississippi Code (1972), which state in relevant part:

Section 77-3-11:

> (1) No person shall construct, acquire, extent or operate equipment for manufacture, mixing, generating, transmitting or distributing . . . electricity for intrastate sale to or for the public for compensation . . . without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

Section 77-1-41:

> Whenever any matter has been determined by the commission, in the course of any proceeding before it, the fact of such determination, duly certified, shall be received in all courts . . . as prima facie evidence that such determination was right and proper.

Section 11-27-47:

> All companies . . . incorporated or organized . . . for the purpose of

constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes . . . are hereby empowered to exercise the right of eminent domain. . . .

Section 77-3-5:

Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. . . .

Section 77-3-47:

The commission shall fix the time and place of hearings, if any is required, and shall serve notice thereof, not less than twenty days before the time set for such hearings, unless the commission shall find that public convenience and necessity requires that the subject hearings be held at an earlier date. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights. Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi.

At the time fixed for any hearing before the commission, or the

time to which the same may have been continued, the complainant and the person complained of shall be entitled in person or by attorney to be heard and to introduce evidence.

Section 77-3-67:

(1) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the chancery court, first judicial district of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in section 77-3-65 or, if the application is granted, within thirty days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper otice order any person to be joined as a party.

* * *

(4) The court may . . . sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may

be. . . . The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the Commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the Commission, or violates constitutional rights.

Section 11-27-15:

Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. . . .

Mississippi Constitution, Article 3, § 17:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a

use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 460 So.2d 107 (Miss. 1984) and is set forth in the Appendix, infra, pp. 57a-79a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2),

this being an appeal which draws into question the validity of Mississippi Code (1972) §§ 11-27-15, 11-27-47 and 77-3-67, supra, on the ground that they are repugnant to the Constitution of the United States.

Appellant instituted proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, for condemnation of land to be used for construction of a high voltage electric transmission line. That court dismissed those proceedings. On appeal, the dismissal was affirmed on October 10, 1984. On December 12, 1984, Appellant's petition for rehearing was denied and the October 10 opinion was modified. As the Supreme Court of Mississippi on December 12, 1984, upheld the statutes and rejected Appellant's challenge to those statutes, as first construed by the Court on October 10, 1984, this matter is appropriately brought to this Court by appeal. See, e.g., Great

Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

In the event the Court does not consider appeal the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2103.

STATEMENT

Certification By the Commission

Prior to attempting to secure the right-of-way for the fifty-one mile high voltage line, Appellant applied to the Mississippi Public Service Commission ("the Commission") for a certificate of public convenience and necessity. Miss. Code § 77-3-11 required such application by a public utility proposing to build a line for any intrastate sale of electricity to or for the public. The high

voltage line that Appellant was building and for which the Commission issued its certificate of public convenience and necessity, was to be located entirely within the State of Mississippi. On October 20, 1981, the Commission issued its "Order Granting Certificate of Public Convenience and Necessity."

Miss. Code § 77-3-67 provides the method of appeal, and standard of review, of Commission orders or findings. No appeal was taken within the prescribed times.

Rulings of Special Court of Eminent Domain

Pursuant to this grant of certificate, Appellant proceeded to acquire the right-of-way for the high voltage line. This acquisition was made both by purchase and by exercise of the power of eminent domain. Prior to initiating the proceeding in question, Appellant had prosecuted to judgment, before this same Special Court and

judge, another eminent domain proceeding for this power line based upon the same certificate of public convenience. (App. at 16a-22a)

Appellant later filed four petitions for condemnation in the Special Court of Eminent Domain, pursuant to Miss. Code (1972) §§ 11-27-2, et seq., when four landowners in the path of the proposed right-of-way did not agree on a purchase price for the easement across their property. An electric utility such as Appellant had eminent domain rights pursuant to 11-27-47. In the Special Court of Eminent Domain proceedings, Appellant relied upon the Order Granting Certificate of Public Convenience and Necessity. (App. at 1a-15a) The Appellees filed their motions to dismiss.

On February 6, 1984, the Special Court filed its Order on Motions to Dismiss. That Court found that all of the electricity traveling through this high

voltage line would be sold to another utility, Louisiana Power & Light Company, and that no Mississippi consumer would be served directly off of this line. The Special Court found that Appellant based its eminent domain claim upon the Commission's certificate of public convenience and necessity. The Special Court ruled that because the power transmitted through this high voltage line would be sold "interstate" rather than to purchasers "intrastate," the Commission did not have jurisdiction, pursuant to § 77-3-51, to issue the certificate. The Special Court noted that the rates to be charged for electric power transmitted by this line would not be within the jurisdiction of the Commission but would be fixed by the Federal Energy Regulatory Commission. (App. at 24a, 27a)

Without deciding whether such a certificate would be required to build a line for the "interstate sale" of electricity,

the Special Court dismissed the eminent domain petitions.

Rulings of the Supreme Court of Mississippi

The Supreme Court of Mississippi affirmed the Special Court of Eminent Domain on several bases, including one not stated by the Special Court. The Supreme Court of Mississippi first found that prior to attempting to secure the right-of-way for this high voltage line, whether for intrastate sales or interstate sales, MP&L was required to obtain a certificate of public convenience and necessity from the Commission. Miss. Code § 77-3-11. (App. at 59a) The Court also found that the electricity which would be transmitted by the line would be sold only interstate, to Louisiana Power & Light Company and that the "primary purpose" of the line was to carry electricity interstate from the

Grand Gulf nuclear energy plant to Louisiana.

The Supreme Court of Mississippi interpreted Miss. Code § 11-27-15, which provides the grounds for dismissal of eminent domain proceedings, as precluding the exercise of the power of eminent domain by a public utility when the primary purpose of the facility or equipment to be constructed is "interstate sales." (App. at 62a-64a, 74a-79a).

Specifically, the Court held that the terms "the public necessity" and "public use" contained in § 11-27-15 "contemplate[d] use by the citizens of this state." (App. at 79a) Since the proposed transmission line would not directly serve any Mississippi customers, the Court ruled that the proceedings were properly dismissed.

The Court further ruled that the Appellees were not barred from attacking the findings and order of the Commission

by Miss. Code § 77-3-67, which provided that such findings and order could be challenged only a direct appeal within thirty days of the order.

How the Federal Questions Were Raised and Decided Below

The federal constitutional questions posed in this appeal were first injected into the case by the Supreme Court of Mississippi in its October 10, 1984 ruling. It was that decision which, for th first time, interpreted the terms "public necessity" and "public use" contained in Miss. Code § 11-27-15 as barring a utility from exercising the power of eminent domain if its proposed transmission line would be used primarily to transmit electricity out of state. Immediately after this decision, the Appellant, in its petition for rehearing, raised this bar to the use of eminent domain as an excessive burden on

interstate commerce. Since the petition for rehearing presented the first opportunity to raise this issue, the issue was timely raised.

It is clear that a constitutional issue may be first raised in the petition for rehearing when the grounds of the state court decision supply a new and unexpected basis for asserting a constitutional claim. Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932). This rule has been specifically applied to those situations in which the constitutional question arose from the state court's decision giving a statute a new construction that, for the first time brought it in conflict with the United States Constitution. Herndon v. Georgia, 295 U.S. 441, 442 (1935). This Court has ruled that in these cases, the constitutional question was timely raised since the petition for rehearing presented the first opportunity to raise that issue.

Id. at 444. The present case qualifies under this rule. The lower court did not interpret § 11-27-15, discuss, or in any way base its decision on the provisions of that statute. The lower court rested its decision on the Public Service Commission's lack of jurisdiction over the proposed interstate line. It was not until the Mississippi Supreme Court interpreted and applied § 11-27-15 that it first became possible to attack that statute as unconstitutional.

In addition, this Court has also considered an issue timely raised if, although first introduced in the petition for rehearing, the state court actually decided against the constitutional claim. Great Northern R. Co., 287 U.S. at 366. It is clear that it is not necessary that the state court decision expressly mention or even refer to the constitutional issue. Chambers v. Mississippi, 410 U.S. 284, 290 (1973); Chicago, B & Q. R. Co. v. Chicago,

166 U.S. 226, 231 (1898). It is sufficient if the "necessary effect" of the decision is to deny the constitutional claim. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, a decision of a state court enforcing and applying a state statute which has been attacked as unconstitutional has the effect of necessarily affirming the validity of that statute, and therefore the decision would be reviewable. Fiske v. Kansas, 274 U.S. 380, 385 (1927). In this case, the Mississippi Supreme Court's decision to deny the petition for rehearing necessarily upheld the validity of § 11-27-15 against the Appellant's constitutional challenge, and, therefore, the constitutional issue involving the statute's effect on interstate commerce is properly before this Court.

Similarly, the due process issue was also raised in a timely manner. The Supreme Court of Mississippi in its

October 10, 1984 opinion introduced the due process question posed in this appeal. Just as the Special Court of Eminent Domain did not evaluate, reach or reject the merits of the Commission's ruling as to the "public necessity" or "public use," that lower court did not recognize the Commission's ruling as establishing prima facie evidence that the Commission's determination was correct and proper, Miss. Code § 77-1-41, and did not find that the Commission's order was not supported by substantial evidence or was contrary to the manifest weight of the evidence.

On appeal, however, the Supreme Court of Mississippi did evaluate the Commission's findings of "public necessity" and "public use" in the manner previously allowed only upon direct appeal from Commission rulings pursuant to Miss. Code § 77-3-67. Miss. Code § 77-3-67 was first construed in a manner that violated due process, by allowing subsequent,

collateral judicial challenges of Commission rulings after direct appeal or after the time for direct appeal has run, on October 10, 1984.

Appellant raised this question of due process at the first opportunity in its Petition for Rehearing and, therefore, the issue is properly before this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

MISSISSIPPI CODE § 11-27-15 IS UNCONSTITUTIONAL BECAUSE IT PLACES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

The Mississippi Supreme Court, in interpreting Miss. Code Ann. § 11-27-15 (1972), held that the terms "public necessity" and "public use" contained in that statute "contemplated use by the citizens of this state." (App. at 799) Since in its opinion the purpose of the proposed transmission line would be to transmit electricity out of state, the Court,

relying on the restrictive definitions of "public necessity" and "public use," refused to give MP&L the right to exercise eminent domain to acquire the right-of-way necessary to construct the power line. Without the power of eminent domain, MP&L is effectively foreclosed from proceeding further with the construction of the proposed transmission line.

As interpreted by the Supreme Court of Mississippi[1], § 11-27-15 clearly violates the United States Constitution by placing an impermissible burden on interstate commerce. The statute, in effect, provides that no utility company proposing to construct a transmission line to

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[1]See, Winters v. New York, 333 U.S. 507, 514 (1947) ("the construction of a state statute by the highest court of the state fixes its meaning for the purpose of determination of its constitutionality by the United States Supreme court as definitively as if it had been amended by the legislature").

transmit electricity out of the State of Mississippi will be allowed to exercise the power of eminent domain. Since the ability to exercise eminent domain is a prerequisite to constructing utility lines, § 11-27-15, by imposing this strict limitation on the use of eminent domain, effectively prohibits any utility from constructing a transmission line to be used primarily to transmit electricity outside this state. This result is clearly impermissible under the United States Constitution.

Initially, it is well settled that no state may prohibit a utility company from transmitting electricity out of state. This Court's decision in New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) makes this clear. In New England Power Co., this Court specifically disapproved a New Hampshire Public Utility Commission

order, entered pursuant to state statute, which had prohibited New England Power Company from exporting hydroelectric energy out of state. In so doing, the Court ruled that the Commission's order violated the commerce clause of the United States Constitution, stressing that the order was "precisely the sort of protectionist regulation that the commerce clause declares off limits to the state." Id. at 339. The Court stated that it could not be "disputed that the Commission's 'exportation ban' place[d] direct and substantial burdens on transactions in interstate commerce", and, therefore, the order was unconstitutional. Id. Arguably, § 11-27-15, by effectively restricting the transmission of electricity out of the state of Mississippi should similarly be invalidated because of

its prohibited burden on interstate commerce.[2]

Additionally, it is also clear that no state can indirectly impose an "exportation ban" by prohibiting the construction of facilities that are to be used to transmit energy out of state. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). This prohibition applies equally as well to a state's attempt to restrict the flow of energy out of state by limiting the right to exercise eminent domain. Id. In West v. Kansas Natural Gas Co., the United States Supreme Court struck down an Oklahoma statute which provided that no company proposing to transmit natural gas out of Oklahoma would be granted a corporate charter or allowed to

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[2]See Id. at 338 (noting that "absent federal legislation, it would be 'questionable' whether a state could constitutionally restrict interstate trade in hydroelectric power").

exercise the right of eminent domain. Id. The effect of the statute was to prohibit the construction of any gas pipeline which would be used to transmit gas out of the state of Oklahoma. The United States Supreme Court, in invalidating the statute, emphasized that "no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on." Id. at 262. This principle, although specifically applied in West to natural gas, should be equally applicable to the present attempt to limit the construction of transmission lines to transmit electricity out of Mississippi.[3]

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[3]See Arkansas Electric Cooperative Co. v. Arkansas Public Commission, 103 S.Ct. 1095 (1983) ("the production and transmission of electricity is an activity particularly likely to affect more than one state and the effect on interstate commerce is often significant enough that uncontrolled regulation by the states can

(Footnote continued)

The Court in West also specifically cited with approval the Indiana Supreme Court decision in State ex rel. Corwin v. Indiana & O. Oil, Gas & Mineral Co., 120 Ind. 575, 22 N.E. 778 (1889). 221 U.S. at 256. The Court's discussion of the Indiana decision is particularly applicable to the present case. The Court stated that the Indiana statute had

> made it unlawful to pipe or conduct gas from any point within the state to any point or place without the state. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended on the other hand, as a provision for the exercise of eminent domain, confining it to those engaged in state business, denying it to those engaged in interstate business; and, further, as imposing restrictions on foreign corporations. . . . The [Indiana] court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose "plainly and unmistakeably

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(Footnote continued)
patently interfere with broader national interests").

> manifested" to prohibit transportation of natural gas beyond the limits of the state; and that, this being its purpose, it was void as a regulation of interstate commerce.

221 U.S. at 256. (Emphasis added).

The reasoning of the Indiana court, specifically endorsed by this Court, is similarly persuasive here. As in Corwin, the State of Mississippi has attempted to limit the right to exercise eminent domain to those utility companies transmitting electricity to points within this state. This Court's apparent disapproval of the Indiana statute should extend to the Mississippi statute in this case.

These cases clearly demonstrate why § 11-27-15 should be declared invalid. In determining the constitutionality of a statute, this Court has consistently held that a statute should be judged by its effect and operation. Near v. Minnesota Ex rel. Olson, 283 U.S. 697, 708 (1931); Standard Oil Co. v. Graves, 249 U.S. 389, 394 (1919). When viewed in this light, it

is readily apparent that § 11-27-15 cannot withstand a constitutional challenge. It is clear that the actual effect of the statute is to prohibit the construction of any transmission line which will be used primarily to transmit electricity out of this state. The statute, in addition, also operates to effectively restrict the transmission of electricity to states outside Mississippi. Previous decisions of this court involving similar efforts by other states to control the flow of energy out of those states clearly indicates the impermissibility of such attempts. See, New England Power Co. v. New Hampshire, 455 U.S. 331; West v. Kansas Natural Gas, 221 U.S. 229.[4] The State of Mississippi, by using § 11-27-15 to seriously restrict

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[4]See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981) ("as the court stated in West v. Kansas, 'in matters of foreign and interstate commerce, there are no state lines'").

a utility company's ability to exercise eminent domain, has attempted to accomplish by indirect means what has otherwise been held to be constitutionally forbidden. This Court should block this effort to circumvent established constitutional principles and rule that ¶ 11-27-15 is constitutionally invalid because of its impermissible effect on interstate commerce.

The constitutional question involved in this case is a substantial one. As this Court noted in FERC v. Mississippi, 456 U.S. 742, 757 (1982), "it is difficult to conceive of a more basic element of interstate commerce than electric energy." This Court's decision on the issue of whether the State of Mississippi can constitutionally restrict or prohibit the transmission of electricity outside the state could significantly affect the ability of other states to similarly

restrict the flow of energy beyond their own borders.

II.

MISSISSIPPI CODE § 11-27-15 IS UNCONSTITUTIONAL BECAUSE IT ALLOWS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Pursuant to Miss. Code § 77-3-11, Appellant applied to the Commission for a certificate of public convenience and necessity for the fifty-one mile transmission line in question. Under § 77-3-47, the Commission was required, among other things, to provide specified notice of any hearing on an application for such a certificate, including notice by publication in a newspaper of general circulation published in Jackson, the state capitol. It is admitted that these notice requirements were followed.

Section 77-3-47 prescribes the manner of hearing and the rights of various persons to be heard. Under § 77-3-67, appeals

from the Commission could be taken only to the chancery court of the judicial district in which the utility's principal place of business is located -- here, Hinds County. Finally, that section provides that Commission orders may not be vacated except for errors of law, or when not supported by substantial evidence, when contrary to the manifest weight of the evidence, when in excess of statutory authority or jurisdiction of the Commission or when in violation of constitutional rights.

Prior to the Supreme Court of Mississippi's opinion on October 10, 1984, there was no state law provision allowing plenary consideration of a Commission ruling, other than by direct appeal under § 77-3-67. In its October 10 ruling, however, the Court construed Miss. Code §§ 11-27-15 as providing such additional appellate review of a Commission ruling in a separate proceeding. So interpreted, § 11-27-15 violates

Appellant's Fourteenth Amendment right to due process of law.

The constitutional problems posed by this new statutory collateral attack are amply demonstrated by the facts of the present case. Appellant applied to the Commission for the required certificate. The Commission served the prescribed notice, including statewide publication in a Jackson newspaper. The Commission held hearings, Appellant presented evidence, and the Commission issued the certificate of public convenience and necessity that was a prerequisite to Appellant's constructing any high voltage transmission line. There was no appeal of the Commission's ruling.

Appellant began purchasing the right-of-way for, and began construction of this fifty-one mile transmission line. When Appellant could not agree upon a right-of-way purchase price with a first group of landowners, Appellant instituted an

eminent domain proceeding, based upon the Commission's October 20, 1981 order (App. at 1a-15a), in the Special Court of Eminent Domain of Walthall County, Judge Joe N. Pigott presiding. That court reached a verdict, and on August 19, 1983, Judge Pigott entered judgment, setting the price to Appellant for the right-of-way for those landowners at $55,880.50. (App. at 16a-22a)

Appellant continued purchasing the right-of-way and constructing the transmission line, all according to the Commission's order of October 20, 1981, until Appellant could not reach agreement on an easement price with the Appellees. Appellant instituted a second eminent domain proceeding, again based upon the Commission's certificate and again before Judge Pigott of the Special Court. This time, however, the Special Court ruled that the Commission did not have jurisdiction to issue the certificate, and

dismissed this second proceeding as based on a invalid certificate.

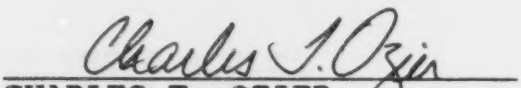
The Supreme Court of Mississippi affirmed that ruling but went further. The Court construed § 11-27-15 as precluding any order of the Commission from ever being final as to anyone who has standing to challenge that order. In reliance upon an unchallenged and presumptively final ruling of the statutorily designated administrative body, an electric utility spends millions of dollars, or tens of millions of dollars, in purchasing the right-of-way for and constructing a high voltage transmission line. But § 11-27-15 now allows any person in the proposed right-of-way path, at any stage of the construction of the line, to render those millions of dollars of expenditures worthless. Section 11-27-15 authorizes the taking of property without due process of law and violates Appellant's Fourteenth Amendment rights. Hughes v. Washington,

389 U.S. 290, 294 (1967) (Stewart, J., concurring).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,



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